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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Before the  
**Federal Communications Commission**  
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	
Table of Allotments,	)	RM-
FM Broadcast Stations	)	
(Dexter, Georgia)	)	

To: Assistant Chief, Audio Division

**SUPPLEMENT TO PETITION FOR RECONSIDERATION**

Broadcast Equities Corp. ("Broadcast Equities"), by its attorney, hereby submits a supplement to the "Petition for Reconsideration" filed by Broadcast Equities on March 22, 2002. With respect thereto, the following is stated:

This is a supplement to Petition filed by Broadcast Equities requesting reconsideration of the Bureau action dismissing Broadcast Equities' Petition for Rulemaking requesting the allotment of Channel 300A to Dexter, Georgia. The Bureau claimed that the Petition for rulemaking was unacceptable because it was short-spaced to the licensed facilities for Station WHTA. Attachment 1.

The Bureau's decision was in error. The WHTA minor change application was for a one-step downgrade (from Channel 300C1 to Channel 300C2) and change of transmitter site. BPH-19990203ID. The construction permit application was granted on January 4, 2001, and therefore became final on February 13, 2001. The application for license to cover the construction permit (File No. BLH-20010920ABE) was filed on September 20, 2001, and was granted on March 13,

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Broadcast Equities' Petition for Rulemaking, filed on September 24, 2001, was dismissed by the Bureau, alleging that the rulemaking must protect the authorized C1 facilities of WHTA until the Class C2 facilities are licensed, *citing Cut and Shoot*, 11 FCC Rcd 16383 (1996). As Broadcast Equities has already argued in its Petition for Reconsideration, *Cut and Shoot* is not applicable because unlike *Cut and Shoot*, where the concern was that "the facilities set forth in some outstanding construction permits are never built and licensed" (*id.* at ¶ 4), here, the prior site *already* was abandoned, and the new modified facilities *already* were built and operating, prior to such time as the Broadcast Equities rulemaking petition was filed. The Commission has recognized that a granting a license to a facility built in full accordance with the terms of a construction permit not only is statutorily mandated (47 U.S.C. §319(c)), it is considered merely a ministerial act. *Effingham Broadcasting Co.*, 4 R.R. 2d 494 ¶ 6 (1975).<sup>1</sup> Therefore, the concerns and reasoning of *Cut and Shoot* are inapposite. *Accord, Pauls Valley and Healdton, OK*, 13 FCC Rcd 11869, n.1 (Chief, Allocations Branch 1989) (where licensee has ceased operation at its

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<sup>1</sup> This is because during the 319(c)) stage of the licensing process, a holder of a construction permit has a protected interest in grant of its license application, and an earlier public interest finding could be overturned only based upon "extraordinary circumstances." *Radio Ingstad Minnesota, Inc.*, 12 FCC Rcd 2502 ¶ 6 (1997), *citing, Whidbey Broadcasting Service, Inc.*, 4 FCC Rcd 8726, 8727 (1989).

licensed site and evidence is presented that licensee has no intention of returning to the licensed site, that site does not have to be protected in a subsequently filed rulemaking petition).

A recent case issued last week makes clear that there was, in fact, no obligation for Broadcast Equities to protect the former licensed facility of WHTA. WHTA voluntarily was issued a construction permit for a downgraded facility, downgrading from Class C1 to C2 through filing a one-step downgrade application. In *Streamlining of Radio Technical Rules of Parts 73 and 74 of the Commission's Rules*, 13 FCC Rcd 14849 (1989), the Commission stated:

**We take this opportunity to clarify the consequences of the grant of a one-step FM commercial station application to change channel or station class. Such a grant amends the table of allotments and modifies that station license to operate on the new channel and/or class. See Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application, Report and Order, 8 FCC Rcd 4735 (1993). During the construction permit period, the licensee may continue to operate the previously authorized facilities on an interim or "implied Special Temporary Authority" basis. However, in contrast to our treatment of routine minor modification applications under Section 73.208, the formerly authorized facilities are no longer protected from subsequently filed applications.**

*Id.* at n.22 (emphasis added). This policy has now been extended also to rulemaking petitions. In *Ardmore, Brilliant, Brookwood, Gadsden, Hoover, AL, et al.*, DA 02-2099 (Aug. 30, 2002), issued last week, a rulemaking proposal was considered that, as here, was ostensibly in conflict with the licensed facilities of a station that had filed and had been granted a one-step station class change.

A rulemaking opponent argued the proposal therefore was deficient, arguing that the proposal was improperly contingent on the licensing of the outstanding construction permit, and that in the meantime the proponent was obligated to protect the present licensed facilities. However, as the Bureau stated:

We disagree. In *Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, the Commission specifically clarified the consequence of a grant of a one-step application to change a station channel or upgrade its class. The Commission stated that the grant of the application amends the FM Table of Allotments and, unlike routine minor change applications under Section 73.208 of the Rules, the formerly licensed facilities are no longer protected... In this situation, the grant of the ... application... was final before the Joint Parties filed its Amended Proposal and the former ... facility ... is therefore no longer an impediment to a[n] allotment at Hoover.

*Id.* at ¶ 12.

Similarly here, since the grant of the construction permit application for downgrade of Station WHTA was final before Broadcast Equities filed its rulemaking petition, pursuant to the Commission's *Streamlining Order*, the former WHTA facility on Channel 300C1 was "no longer an impediment" to an allotment of Channel 300A to Dexter, Georgia. Therefore, for this reason, as well, the dismissal of the Petition for Rulemaking was in clear error.

**WHEREFORE**, for the forgoing reasons, it respectfully is requested that the  
Petition for Reconsideration be granted.

Respectfully submitted,

**BROADCAST EQUITIES CORP.**

By:  \_\_\_\_\_  
Dan J. Alpert

Its Attorney

*The Law Office of Dan J. Alpert*  
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703-243-8690

September 3, 2002

***ATTACHMENT 1***



Federal Communications Commission  
Washington, D.C. 20554

February 20, 2002

The Law Office of Dan J. Alpert  
2120 N. 21<sup>st</sup> Road  
Arlington, VA 22201

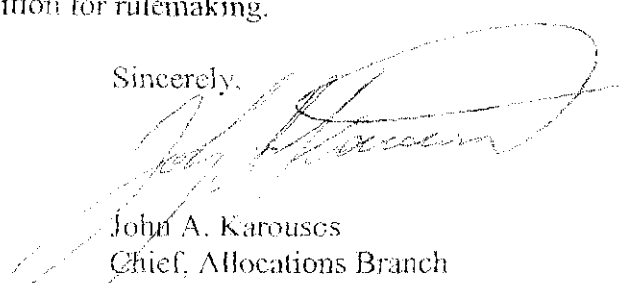
Dear Mr. Alpert:

This letter refers to the petition for rule making you filed on September 24, 2001, on behalf of Broadcast Equities Corp., requesting that FM Channel 300A be allotted to Dexter, Georgia.

An initial review of your petition shows that it is unacceptable for consideration at this time. The proposal for Channel 300A at Dexter is short-spaced to the licensed facilities for Station WHTA, Channel 300C1, Hampton, Georgia. Although a construction permit has been issued to allow the station to change to Channel 300C2 at a location that would be fully spaced, no license has been issued for the facilities proposed. In regard to this downgrade at Hampton, any rulemaking proposal must protect the authorized Class C1 facilities until the Class C2 facilities are licensed. See Revision of Section 73.3573(a)(1) of the Commission's Rules Concerning the Lower Classification of an FM Allotment, 4 FCC Rcd 2413 (1989). Thus, your request is contingent on the grant of the license for the facilities specified in the construction permit for Station WHTA, and we do not accept such contingent petitions for rulemaking. See Cut and Shoot, Texas, 11 FCC Rcd 16383 (1996).

Therefore, we are returning your petition for rulemaking.

Sincerely,



John A. Karouscs  
Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau